SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1230

PEPSI-COLA BOTTLING COMPANY OF MIAMI, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-3682 — 371-4726

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NO. _____

PEPSI-COLA BOTTLING COMPANY OF MIAMI, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Pepsi-Cola Bottling Company of Miami, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in Case Number 71-1528 on November 4, 1971.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1-16) is reported at 449 F.2d 824. The decision and order of the National Labor Relations Board and the Trial Examiner's decision (App. B, *infra*, pp. 17-44) are reported at 186 NLRB No. 73.

JURISDICTION

The decision of the court of appeals was issued on October 13, 1971 (App. A, *infra*, pg. 1) and the judgment was entered November 4, 1971 (App. C, *infra*, pp. 45-46). Petitioner's timely petition for rehearing was denied on December 28, 1971 (App. D, *infra*, p. 47). Pursuant to petitioner's timely motions, the mandate of the Court of Appeals was stayed until March 27, 1972 (App. E, *infra*, pp. 49-50).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board and the Court of Appeals erred in finding that petitioner violated Sections 8(a) (3) and (1) of the Act when it discharged employees who engaged in a sit-down strike during working hours in petitioner's plant and who refused to work or leave the premises until ordered to do so by law enforcement officials?

2. Whether the National Labor Relations Board and the Court of Appeals erred in finding that petitioner violated Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the union on or after September 22, 1969; by granting employees wage increases and changing other working conditions; and, by offering to deal directly with employees concerning their complaints.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.), are set forth in Appendix F, *infra*, pp. 51-53.

STATEMENT OF THE CASE[1]

Petitioner is a Florida corporation with its place of business in Miami, Florida, where it is engaged in the manufacture and sale at wholesale of soft drinks (App. B, *infra*, pg. 20)[2]

Pursuant to a Direction of Election issued by the National Labor Relations Board there was an election held

[1]The Court of Appeals had jurisdiction over this cause pursuant to the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 Section 10.

[2]"R" references are to the Joint Appendix which comprised the record in the court of appeals. "App." references are to the appendices which have been separately presented in accord with Rule 23(1)(i) of this Court's rules. "S.F." references are to the Stipulation of Facts executed by the parties and referred to in the Joint Appendix as General Counsel's Exhibit 2.

at the petitioner's plant. Subsequently, on July 25, 1969,[3] the union[4] was certified as the exclusive collective bargaining representative of petitioner's production and maintenance employees, including vending department employees, warehouse employees and checkers (S.F., Para. 5 and 6). In accord with this certification, petitioner met, upon request, with the union on August 29 and commenced negotiations concerning wages, hours and working conditions (R. 120; S.F., Para. 6 and 7(a)).

At this meeting on August 29, the union presented a proposed agreement and a few days later petitioner presented its proposed contract to the union (R. 59-115).

On September 5, after these contract proposals and counter-proposals had been exchanged between the parties, six bargaining unit employees who disapproved of the bargaining admittedly engaged in a slowdown and were discharged by petitioner (S.F. Para. 7(b); R. 126).[5]

On Monday morning, September 8, the remaining bargaining unit employees reported to work and demanded the reinstatement of the six employees discharged the previous Friday for engaging in a slowdown (S.F., Para. 7(c)). The petitioner refused to reinstate the six dis-

[3]Unless otherwise stated, all dates hereafter occured in 1969.

[4]"Union" references are to the United Steelworkers of America, AFL-CIO, while "Board" references are to the National Labor Relations Board.

[5]The discharge of these six employees was the subject of an unfair labor practice charge (R. 2-4); however, after an investigation by the Regional Director the charge was amended so as to remove these discharges from consideration by the Board (R. 5-7). General Counsel did not contend that these discharges, which precipitated the subsequent sit-down strike, were unlawful (R. 40).

charged employees and requested the employees, numbering ninety-seven, to either return to their jobs in the plant or leave the plant. They refused to return to work or leave the plant and engaged in a sit-down strike (S.F., Para. 7(c); R. 126; App. A, *infra*, p. 22).

The employees, having refused to return to work or leave the premises, were informed by petitioner that they were being discharged for engaging in an illegal sit-down strike. Petitioner then contacted the police, who arrived at the plant sometime later. When requested to leave by the police, the ninety-seven employees left the plant and commenced picketing petitioner's premises with signs protesting the latter's alleged unfair labor practices (S.F. Para. 7(c), 7(d)).

On that same day, September 8, petitioner met with union representatives and engaged in further collective bargaining negotiations. At this meeting the union representatives demanded, and petitioner refused, reinstatement of the six employees discharged on September 5. Petitioner again met with the union representatives on September 15, where, in response to the union's request for a wage increase, the petitioner offered a three and one-half percent increase for all employees in the unit. The union rejected this proposal.

Petitioner's counsel, on September 18, informed the union representatives that petitioner was standing firm on its three and one-half percent wage increase offer. Petitioner's counsel also informed the union that it would not reinstate the employees discharged on September 5 or the strikers. By letter of September 18 counsel for petitioner advised the union that it was petitioner's position

that the union could not legally demand return of these employees as a condition to reaching a collective bargaining agreement. In its letter petitioner offered to negotiate concerning legitimate contract issues (S.F. Para. 7(g); R. 116).

On September 17 and 18, petitioner's general manager Herbert Paige met with a member of the union negotiating committee and one of the employees who had been discharged on September 5. Paige told the committeemen that the petitioner would give the employees an increase of twenty-five cents per hour, make improvements in some of the fringe benefits and reinstate all employees if they would return to work. All former employees were rehired and the increase and improvements mentioned above were granted by petitioner (S.F. Para 7(h) (i) (j) (k) (l)).

FINDINGS AND DECISIONS OF THE TRIAL EXAMINER, BOARD AND COURT OF APPEAL[6]

In accordance with the complaint and based on the stipulated facts submitted in Case Nos. 12-CA-4639 and 12-CA-4716, the Board concluded that the petitioner violated Sections 8(a) (5) and (1) of the Act; by refusing to meet and negotiate with the union; by bargaining directly with the employees; by granting employees wage increases and improving their working conditions and by telling the employees that the union was dead at the plant (App. B, pg. 39).

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[6]The Trial Examiner's decision need not be separately discussed as the Board adopted same *in toto*.

The Board additionally concluded that petitioner violated Sections 8(a) (3) and (1) of the Act by discharging its employees who engaged in the sit-down strike on September 8 (App. B pg. 39).[7] The court of appeals enforced the Board's Order (App. A, pg. 16).

REASONS FOR GRANTING THE WRIT

I. The National Labor Relations Board and the Court of Appeals erred in finding that petitioner violated Sections 8(a)(3) and (1) of the Act when it discharged employees who engaged in a sit-down strike during working hours in petitioner's plant and who refused to work or leave the premises until ordered to do so by law enforcement officials.

The Board and the court of appeals misapplied this Court's decision in *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240. In the first instance the Board, taking cognizance of petitioner's reliance on *Fansteel*, noted that it dated "back to the late 1930's, the early years of the Act." Apparently the Board is of the opinion that age somehow dissipates the strength of the Court's decisions. Petitioner on the other hand relies on the Court's decision in *Fansteel* as the basic precedent on the subject of the sit-down strike — the Board's preference to use "newer" cases from "lower" jurisdictions to support its conclusions notwithstanding.

In *Fansteel* this Court settled the principle that the sit-down strike is not a legitimate weapon to be used in the field of labor relations and established that employees

[7]It is particularly significant to note that Chairman Miller would not find the discharges here in question violative of the Act (R. 112).

engaged in such intolerable activity removed themselves from the protection of Section 7 of the Act and could be discharged without legal consequence.

In *Fansteel* the employer discharged a large number of employees for engaging in a sit-down strike in protest of the employer's unfair labor practices. Rejecting the Board's contention that unfair labor practices of the company led to the strike and thus furnished a ground for requiring the reinstatement of the strikers, this Court noted:

> "But reprehensible as was that conduct of Respondent, there is no ground for saying that it made Respondent an outlaw or deprived it of its legal rights to the possession and protection of its property . . . We may put on one side any contested questions as to the circumstances and extent of injury to the plant and its contents in the efforts of the men to resist eviction. *The seizure and holding of the building was itself a wrong apart from any acts of sabotage.* But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault on the officers of an employing company, or the seizure and conversion of its goods, or the disposing of its property or other unlawful acts in order to force compliance with demands. To justify conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society." *Supra* at 518-519 (Emphasis supplied).

Petitioner submits that its right to discharge the participants in the admitted sit-down strike in its plant area is clearer than was the employer's in *Fansteel*. Thus, here the employees did not sit-down and refuse to leave the plant in protest of any unfair labor practice engaged in by petitioner but did so because petitioner had taken action recognized as legally proper to defend itself from an unprotected slowdown. Indeed, it is admitted that the discharge of the six employees engaged in the slowdown was not violative of the Act and that the sole cause of the sit-down strike was petitioner's refusal to submit to the employees' demand that the six dischargees be reinstated. Further, there is no contention that petitioner engaged in any unlawful activity prior to the time the employees decided to take matters into their own hands through the use of the unprotected activity in question here.

Both the Board and the court of appeals distinguished the factual situation herein from that in *Fansteel* on two primary grounds:

1. The sit-down strike in *Fansteel* was of greater duration, with the employees holding the premises in defiance of the owner's right of possession; whereas the sit-down strike participated in by petitioner's employees lasted only a few hours and did not extend beyond the employees normal working hours.

2. The sit-down in *Fansteel* was accompanied by acts of sabotage and violence; whereas petitioner's employees did not engage in such conduct.

The Board and court of appeal's reliance on the fact that the sit-down here did not go beyond the shift upon which it occurred and did not result in the management representatives being dispossessed of the plant property is inappropriate. Certainly the adverse effect condemned by *Fansteel* is not limited to a situation where management is actually expelled from its plant, but extends to a situation where an employer has lost the use of his property due to the presence of the sit-down strikers in the working area. Such was the situation here. Similarly, the Board and court of appeals reliance on the time factor was erroneous. Certainly at the time petitioner discharged the sit-down strikers it did not know how long they were going to adhere to their demands and continue to physically control its property and prohibit production by their presence. The Board and court inferred that because the situation was short lived it was protected. They have the cart before the horse. Obviously, the duration of the sit-down strike was unknown when it commenced; thus the inference that the activity was protected because it ended shortly thereafter is improper. It was either protected or unprotected at the time the employees were discharged — that is the only issue as to the Section 8(a) (3) charge; what happened at a later time is of no significance since it could not possibly effect the validity of the discharges. Indeed, the Court so indicated in *Fansteel, Supra*, at 521.

The Board and the court of appeal's reasoning with regard to point two above will not stand up under careful scrutiny. Petitioner submits that the crucial issue is not whether violence accompanied the sit-down strike but whether the situation was potentially violent. The record herein strongly supports the conclusion that the instant

strike was potentially violent. Indeed, the fact that no violence accompanied the admitted sit-down here is not significant. See *Cone Mills*, 413 F.2d 445, 71 LRRM 2916 (4th Cir. 1969); *Lee Cylinder Division of Golay & Co.*, 156 NLRB 1252, *enf'd.* as mod. 371 F.2d 259 (7th Cir. 1966). Contrary to the Board and court's conclusion, when the employees engaged in this sit-down the setting was ripe for violence and the burden should not be on petitioner to second guess human nature and determine whether or not violence will erupt. Petitioner was denied the possession and use of its plant by employees protesting obviously legal discharges — employees who were unwilling to recognize petitioner's legitimate right to operate its business or to make use of the accepted methods of resolving their grievances; i.e., bargaining through the union, striking petitioner or making use of the processes available through the Board.[8]

Thus, the Board and the court of appeals ignored the major conceptual considerations established as sound legal precedence in *Fansteel* and distinguished that case from petitioner's by relying on insignificant factual distinctions.

There is a conflict among the courts of appeal for the various circuits as to the meaning and appropriate application of the Court's decision in *Fansteel.* The Third, Seventh and Fourth Circuits consider the sit-down strike, at least in situations where the employer has requested that the employees return to work or leave the premises, to be an unprotected activity for which the employer may discharge

[8]It should be noted that there is no contention that petitioner's bargaining with the union was in any way improper or illegal prior to the sit-down strike or that petitioner had otherwise violated the Act.

the participants without legal recourse.[9] *McNeely and Price Co. v. NLRB*, 106 F.2d 878, 5 LRRM 724 (3rd Cir. 1939); *Stewart Dye Casting Corp. v. NLRB*, 114 F.2d 849, 6 LRRM 907 (7th Cir. 1940); *Lee Cylinder Division of Golay and Co., Inc.*, 156 NLRB 1252 enf'd as mod. 371 F.2d 259 (7th Cir. 1966); *Cone Mills Corp. v. NLRB*, 413 F.2d 445, 71 LRRM 2916 (4th Cir. 1969); *NLRB v. Hanes Hosiery Division*, 413 F.2d 457, 71 LRRM 2922 (4th Cir. 1969). Apparently the Fifth, Tenth and Second Circuits take the contrary position that the sit-down strike, under certain circumstances, is the type of concerted activity protected by the Act. *NLRB v. American Manufacturing Company*, 106 F.2d 61, (2nd Cir. 1939); *Olin Industries, Incorporated v. NLRB*, 191 F.2d 613, (5th Cir. 1951); *NLRB v. Serv-Air, Incorporated*, 401 F.2d 363, (10th Cir. 1968).[10] Petitioner respectfully submits that the Court should grant its writ and settle the conflict.

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[9]It should be noted that the Fourth Circuit in *Cone Mills* cited with approval the Seventh Circuit's decision in *Golay and Co.* wherein that court upheld the discharge of several sit-down strikers whose discharge was not "preceded by a warning to the employee to either strike off of company property or be discharged." *Cone Mills, Supra* at 2922.

[10]Petitioner would point out to the Court that the factual situations in *Olin Industries* and *Serv-Air* differ so greatly from the one herein that these cases lend little or no support to employees' position in this cause. In *Olin Industries* the first shift employees refused to work for fifteen minutes to present demands to the employer. The employer then discharged *only the ringleaders*. The second shift subsequently refused to work because of these discharges and the employer eventually shut down the plant locking out all the employees. Most significant, unlike the case at bar, is the fact that during these work-stoppages the employees saw to it that certain of their fellows stayed at the machines and kept them operating while the remainder of the employees left their machines and congregated in the wash room.

In *Serv-Air* a group of employees met during their lunch hour and drew up a written grievance. Two employees made three attempts to present the grievance to their employer *during their lunch hour* and each request was denied, the employer stating that he would receive the

There is absolutely no legal, equitable or economic justification for the decision of the court of appeals in this cause. If allowed to stand it will only serve to further confuse an already uncertain area of law. The decision leaves unanswered the question of what an employer such as petitioner should do when faced with the Hobson's choice of having either to concede to an improper demand (the return of six legally discharged employees) or not be able to operate its business. What alternatives were left under the circumstances herein? Was petitioner to close its plant and steal away in ignonomy? Was it to bring in replacements and risk the chance of a holocaust or was it to take back the six employees whose activity was admittedly illegal?

Petitioner suggests that it was not required to adopt any of these unacceptable alternatives but was entirely within the letter and spirit of the law in discharging employees who would neither work nor vacate the premises so others could work.

Therefore, petitioner requests that the Court adopt the "return to work or leave the premises" concept whereby an employer has the obligation to first request that his

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grievance two days later. Some of the employees then refused to work and again requested that the employer listen to their grievance which request was denied. The employer repeatedly ordered the employees to work and eventually fired them. Shortly after being fired the employees met and decided to return to work and to present the grievance to the employer two days later as he had suggested. The employer was immediately notified of this offer; however, he refused it and told them to turn in their equipment. Thus, the factors distinguishing *Serv-Air* from this cause are readily discernable. In the first instance, the employees in *Serv-Air* attempted to resolve their grievance with management on their own time during lunch; then after being denied an audience with management they refused to work but a few minutes later agreed to return to work. Further, management never offered them the option of returning to work or leaving the premises but rather discharged them for refusing to work.

employees return to work or carry on their strike outside the plant before he would be justified in discharging them for such activity. This concept affords employees the right to protest in support of their grievances without depriving the employer of its right to control and operate its business. What legal or equitable concept would be served by granting employees the right to stay on the company premises at their work station without working when their purposes could be equally well served by carrying on the strike off the company property? It is not a question of balancing the rights of one party with that of another but rather involves the deprivation of the employer's right to the possession and unmolested operation of his business.

II. The National Labor Relations Board and the Court of Appeals erred in finding that petitioner violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union on or after September 22, 1969; by granting employees wage increases and changing the working condition; and by offering to deal directly with employees concerning their complaints.

It is the petitioners position that if the Court should ultimately agree with petitioner on point I above then the Court should also find that petitioner did not violate the Act by refusing to recognige the bargain with the union, by dealing directly with ex-employees, by granting certain unilateral increases in wages and changing other working conditions, or by offering to deal with an employee committee concerning their complaints since the union had lost its majority status under circumstances relieving petitioner of any further obligation to recognize and bargain with the union and freeing petitioner to act unilaterally with respect to its employees' wages, hours and working

conditions. Furthermore, it is suggested that the record does not support the conclusion that petitioner dealt directly with *employees* or granted unilateral increases in wages or working conditions in violation of Section 8(a)(5) since the persons with whom Mr. Paige dealt, and to whom certain increases were given, were not employees but merely applicants for employment with whom petitioner had a right to deal unilaterally regardless of the union's status as bargaining representative.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

GLENN L. GREENE, JR.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that copies of the foregoing petition have been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this 26th day of March 1972, to the following:

Marcel Mallet-Prevost
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GLENN L. GREENE, JR.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-1528
Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

PEPSI-COLA BOTTLING COMPANY OF MIAMI, INC.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board
(Florida Case)

(October 13, 1971)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge: This case is before the Court upon application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, 29 U.S.C.A. §151, et seq (the Act) for enforcement of its cease and desist order against Pepsi-Cola Bottling Company (the Company) based on violations of Sections 8(a)(5), 8 (a)(3), and 8 (a)(1) of the Act.

*Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al, 5th Cir. 1970, 431 F.2d 409, Part I.

The facts, largely stipulated, are not in great dispute. The Company is engaged in the manufacture and sale of soft drinks in Miami, Florida and employs approximately 300 persons, including the production and maintenance employees who form the bargaining unit in the instant case. On July 17, 1969, the Board conducted a representation election at the Company's plant that resulted in certification of the United Steelworkers of America, AFL-CIO (the Union) as the exclusive bargaining representative of the unit employees on July 25, 1969.

Union representatives Nicholas Fayad and Carlos Suarez met with Company officials on August 29 to discuss contract terms. No agreement was reached, however. On September 5, six unit employees who were dissatisfied with the progress of bargaining engaged in a work slowdown and were discharged by the Company.[1] On the morning of September 8, after working for a brief period, 97 unit employees ceased work and went to the plant manager for the purpose of protesting the discharges of September 5. When the plant manager refused to accede to a demand for reinstatement, the employees sat down in the plant and refused their employer's demand that they return to work or leave the plant. The employees made no attempt to seize the plant or machinery, did not engage in violence or make threats of violence, and did not damage plant equipment. Shortly after refusing management's request to leave, all 97 employees were discharged for what

[1]No contention is made, nor did the Board find, that the discharge of these six employees was unlawful. Cf. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 80 S.Ct. 419 (1960); Elk Lumber Co., 91 NLRB 333, 26 LRRM 1193 (1950); Faber Bros., Inc., 94 NLRB 748, 28 LRRM 1090 (1951).

Company officials characterized as an "illegal sit-down strike." Shortly before noon, the Company telephoned the police, who upon arrival requested the employees to leave the premises. The employees complied with this request and began picketing outside with signs protesting the Company's alleged unfair labor practices.

At the meeting on August 29, the Union had presented a proposed contract with detailed rates of pay and other benefits. The Company's counterproposals submitted a few days later contained no offer concerning wages, pensions, vacations, holidays or insurance but specified that these matters were to be discussed at a later meeting with no formal company proposals to be submitted on these points until that time. Union representatives met with the Company again on September 8. The Union demanded reinstatement of the six employes discharged on September 5, and the Company refused. The Union met with the Company for a third time on September 15. The Union requested a wage increase and the Company offered approximately 7 cents per hour for all employees, which the Union rejected.

On September 17, the Company's general manager, Herbert Paige, met with Julio Ochoa, one of the six employees discharged on September 5. Upon assurances that the employees did not wish to deal further with the Union, Paige told Ochoa that the Company would give the employees a wage increase of 25 cents per hour and would reinstate all 103 discharged employees. Paige also told Ochoa that the Company would give each employee one week's pay, which would be considered a loan at first, and an outright gift later if production increased.

The following day, September 18, Company counsel Greene called Union negotiator Suarez and informed him that the Company was standing pat on the 7 cent per hour wage offer and refused once again to reinstate any of the discharged employees. That same day, Greene sent a letter to Union negotiator Fayad confirming this position and cancelling a negotiating session that had been scheduled for September 22. Greene stated that he had to be away from Miami all that week because of an emergency with one of his out-of-state clients. In this letter Greene also stated that the Union's demand for reinstatement was illegal and could not be made a condition precedent to reaching an agreement. He concluded by stating: "If and when you desire to negotiate about legitimate contract issues, we will be most happy to meet with you at a mutually convenient time; otherwise, we see no point in continuing our discussions."

That same day, September 18, Paige again approached Ochoa and another discharged employee, Pedro Goderich, and repeated the offer of reinstatement for all employees and a 25 cent hourly wage increase. Paige also promised that the Company would improve its employee insurance program, attempt to improve allowance for uniforms, and keep the production bonuses in effect at the plant. The Company made none of these offers to Union representatives Fayad or Suarez.

On September 22, the Company reinstated all the discharged "strikers" as well as the six employees discharged on September 5. The employees accepted reinstatement and stopped picketing. That same day, Union negotiator Fayad wrote Paige objecting to the Company's having met with the local union committee members with-

out notifying the Union negotiating team. The Union also protested the Company's cancellation of the bargaining session that had been scheduled for that day and to the Company's failure to provide another negotiator to replace Greene. The Union insisted that the negotiations had not reached an impasse, adding "We are certain that if you intend to bargain in good faith we can reach a settlement." The Company never responded to this letter and no further bargaining sessions between the Union and the Company were held.

On September 23, Paige made a speech to all employees in which he stated that the Union was dead at the plant, that he would deal with all employee committee concerning employee complaints, and that his door was always open to individual complaints. Paige further promised that the employees would receive a 25 cent per hour across-the-board pay increase, a better insurance plan, and one week's pay for the time they were on strike. Subsequently, on September 24 and October 2, Paige met again with certain employees and agreed to provide better ventilation, improved toilet facilities at the plant, and a 15-minute break period. About a week later, the Company gave each employee the promised hourly wage increase of 25 cents.

Upon the foregoing facts, the Board found that the Company had violated Sections 8(a)(3) and (1) of the Act by discharging the 97 employes for engaging in protected concerted activities on September 8. The Board further found that the Company had violated Sections 8(a)(5) and (1) by refusing to meet and negotiate with the Union as the employees' exclusive bargaining representative, by bargaining directly with its employees, by

unilaterally granting them higher wages and better working conditions than it had offered the Union, by telling the employees that the Union was dead at the plant, and by offering a deal with an employee committee concerning employee complaints.

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with its employees in the exercise of their Section 7 rights, to bargain with the Union on request, and to post appropriate notices.[2]

The Company resists enforcement of the Board's order on the following bases.

I. Discharges

The Company, relying on NLRB v. Fansteel Metallurgical Corporation, 306 U.S. 240, 59 S.Ct. 490 (1939), argues that the so-called "sit-down strike" of the 97 employees did not constitute concerted activity protected under Section 7 of the Act.[3] The discharges would, therefore, be for cause and would not violate Sections 8(a)(3) and (1).

In Fansteel, 95 employees, in response to their employer's unfair labor practices, took over and held two of the employer's key buildings, causing the remainder of

[2]No order to reinstate the 97 discharged employees with back pay was given in that the employees had already been reinstated and the interval between the demand for reinstatement and actual reinstatement was less than 5 days, the period customarily granted by the Board in such cases.

[3]See also Stewart Die Casting Corp. v. NLRB, 7th Cir. 1940, 114 F.2d 849, cert. denied 312 U.S. 680 (24-hour sit-down); McNeely & Price Co. v. NLRB, 3d Cir. 1939, 106 F.2d 878 (six-day sit-down).

the plant to cease operation. Late in the afternoon, after the employees' shift had ended, the plant superintendent, accompanied by police officers, came to the plant and demanded that the employees leave. Upon their refusal, the men were discharged. The employees continued to hold the buildings for nine days, during which time a pitched battle occurred between workers and police officials upon efforts of the police to evict the strikers. Only upon reinforced police efforts were the employees finally forcefully evicted.

Holding the sit-down strike to be illegal and unworthy of the Act's protection, the Court stated:

> But reprehensible as was that conduct of the respondent, there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property . . . . We may put on one side the contested questions as to the circumstances and extent of injury to the plant and its contents in the efforts of the men to resist eviction. The seizure and holding of the building was itself a wrong apart from any acts of sabotage. But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault on the officers of an employing company, or the seizure and conversion of its goods, or the disposing of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on

resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.

59 S.Ct. at 495.

Further, the Supreme Court noted:

This was not the exercise of "the right to strike" to which the Act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful . . . When the employees resorted to that sort of compulsion they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve.

* * * *

There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights . . . . To secure the prevention of unfair labor practices by employers, complaints may be filed and heard and orders made. The affirmative action that is authorized is to make these remedies effective in the redress of employees' rights, to assure them self-organization and freedom in representation, not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct. We are of the

> opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure.

59 S.Ct. at 496-97.

The Company takes the position that all sit-down strikes are thus unprotected by Section 7 and are "not a legitimate weapon to be used in the field of labor relations." The cases since Fansteel, however, are clearly contrary to this contention.

For example, NLRB v. American Manufacturing Company, 2d Cir. 1939, 106 F.2d 61, likewise involved a temporary work stoppage induced by an employer's unfair labor practices. The employees refused the employer's order to return to work or leave, but the court refused to consider such activity an illegal sitdown strike which would permit termination of employment, stating:

> They (the employees) certainly were not claiming to hold the premises in defiance of the right of possession of the owner and we regard the case as no different from that of an ordinary strike where work has ceased because of an unfair labor practice.

106 F.2d at 68 (emphasis added)

In this Circuit similar activities have likewise been protected. In Olin Industries, Incorporated v. NLRB, 5th Cir. 1951, 191 F.2d 613, a group of employees refused to

return to work after their lunch break, during which time demands were presented to the employer. Plant guards were called but there was no violence and at the Union's suggestion, work was resumed shortly. The Court found the Board's determination that the resulting discharges were violative of Section 8 (a)(3) to be supported by the record.

In Cone Mills Corporation v. NLRB, 4th Cir. 1969, 413 F.2d 445, a panel of the Fourth Circuit did find analogous activity to be unprotected. In Cone Mills, fifteen or twenty employees engaged in a work stoppage to protest the discharge of a fellow employee. The union steward, in spite of established grievance procedures to the contrary, demanded the immediate reinstatement of the discharged employee before beginning discussions. Several of the employees stated they would continue to stand by their machines and refuse to work until the discharged employee was rehired. One stated he would have to be evicted before he would leave. After several employer requests to the employees to return to work or leave, they were discharged. The court, relying heavily on the regular grievance procedures in effect and finding that the employees had already made their point about their feelings concerning the previously discharged employee, found no violation of Section 8 (a)(1).

However in NLRB v. Serv-Air, Incorporated, 10th Cir. 1968, 401 F.2d 363, involving employees' refusal to return to work until certain grievances were discussed further, the court stated: "[i]n the absence of an established grievance procedure, a spontaneous work stoppage to present a grievance was a protected activity."

The real issue boils down to whether the activity of the employees in the instant case is more closely analogous to the actions of the employees in Fansteel and Cone Mills or those in Olin Industries, American Manufacturing and Serv-Air.

We find no facts in the instant case tending to show that the employees were claiming to hold the premises in defiance of the owner's right of possession. The employees had worked for part of the work shift already and the sit-down did not, nor did it threaten to carry over into the next shift. Furthermore, the employees left immediately when requested to do so by the police. The mere act of sitting down on the job in order to further discussions with an employer, as was done in the instant case, can alone furnish no basis for a finding that the acts constituted a forcible seizure of the employer's property. Fansteel does not so hold, and we know of no case that does.

The strikers were not shown to have interfered with the work performance of non-strikers, and their actions were unaccompanied by violence or the threat of violence. The Company would have us hold that any sit-down activity necessarily carries with it a threat of violence sufficient to clothe the employer with the right to discharge those responsible. We reject any such notion. Without more than the mere act of sitting down during a labor dispute, there is no more incitement or probability of violence than is necessarily incidental to any other act.

The Company contends that its employees became illegal trespassers subsequent to management's order to

leave the plant, and their activity can thus not be condoned or protected by this Court.[4] We do not agree. In all similar work stoppage cases previously discussed, the employer had ordered his employees to leave or return to work. We do not, therefore, deem this factor to be dispositive of the instant case. An employer cannot convert a protected in-plant work stoppage into an unprotected trespass by the simple expedient of ordering his employees from the plant where, as here, such an order serves no immediate employer interest and unduly restricts the employees right to present grievances to their employer. The employer interest in maintaining an established grievance procedure and the absence of restriction on employees in the face of such procedures, such as that found in Cone Mills, is not present in the instant case. At the time of the sitdown strike, negotiations between the Company and the Union had just begun pursuant to the Union's certification only two months prior. There is no evidence of any established, regular procedure by which employees were to present their grievances. Under such circumstances, we cannot find

---

[4]The Company relies heavily upon a Florida statute, which provides in pertinent part:

> Whoever willfully:
>
> (1) Enters into the enclosed land and premises of another or into any private residence, house, or building of another, having been forbidden so to enter by the lawful occupant;
>
> (2) Not having previously been forbidden, is warned to depart therefrom and refuses to do so;
>
> * * * *
>
> shall upon conviction be punished . . . . F.S.A. § 821.01 (Supp. 1970)

Because of our decision under the circumstances of the instant case we have no occasion to decide at this time whether this statute could be utilized against employees in any case within the context of a labor dispute.

that the employees had no interest in presenting their grievance in the manner chosen in the instant case.[5]

We find the Board's decision to be supported by substantial evidence and not contrary to the Supreme Court's decision in Fansteel. We, therefore, grant enforcement to this portion of the Board's order.

II. Refusal to Bargain

The Company contends that the Board's determination that the Company refused to bargain cannot be supported because the Union effectively negated the necessity for further bargaining by demanding an unreasonable and improper condition, the rehiring of the six justifiably-discharged employees, as a prerequisite to reaching an agreement.

This contention had no support in the record. The trial examiner found that the Union presented its position on the strikers' reinstatement not as an unconditional demand, but rather as bargainable issue. Such request did not, therefore, excuse the Company from its duty to bargain further. See National Licorice Company v. NLRB, 309 U.S. 350, 60 S.Ct. 569 (1940); Midwestern Instruments, Inc., 133 NLRB 1132, 48 LRRM 1793 (1961). Furthermore, the fact that the Company reinstated the employees shortly

[5]The Company also relies heavily on the fact that the employees' action in the instant case was unrelated to any lawful employer conduct, but rather was in response to the employer's lawful discharge of the six employees. Such reliance is misplaced. It is well settled that a concerted work stoppage to protest even a lawful discharge of a fellow employee is protected by Section 7 of the Act. NLRB v. Phaostron Instrument and Electronic Co., 9th Cir. 1965, 344 F.2d 855; NLRB v. Holcombe, 5th Cir. 1963, F.2d 508; NLRB v. Puerto Rico Rayon Mills, Inc., 1st Cir. 1961, 293 F.2d 911; NLRB v. Solo Cup Co., 8th Cir. 1956, 237 F.2d 521; NLRB v. J. I. Case Co., 8th Cir. 1952, 198 F.2d 919, cert. denied, 345 U.S. 917.

after the letter of September 18 indicated to the trial examiner that such demand was not the real cause of the Company's refusal to bargain. Rather the Company's purpose was to avoid bargaining with the Union and subvert its influence by giving the employees reinstatement and the improvements in wages without discussion.

At any rate, even if it could be found that such an unnegotiable demand was made, such misconduct was cured by the Union's letter of September 22, after the reinstatement of all employees, that reiterated the Union's desire to negotiate and expressed the belief that an agreement could be reached if only the Company would agree to meet. This indicated the Union's conciliatory attitude and willingness to bargain on all issues, to which the Company should have been willing to respond in good faith.

These facts, undisputed in the record, destroy the Company's argument and fully support the Board's finding violations of Sections 8(a) (5) and (1).

The Company further contends that it was relieved of its obligation to bargain during the certification year because of the Union's loss of majority status through no fault of the employer, and the employees' clearly indicated desire to cease bargaining through the Union. Assuming that any loss of majority support for the Union was not due to the Company's actions, a contention we find incredible at best, the employer nevertheless had the duty to bargain with the Union during the certification year.[6] Confronted with a similar situation, the Supreme Court in Brooks v. NLRB, 348 U.S. 96, 75 S.Ct. 176 (1954):

[6]See Ray Brooks v. NLRB, 348 U.S. 96, 75 S.Ct. 176 (1954); NLRB v. Miami Coca-Cola Bottling Co., 5th Cir. 1967, 382 F.2d 921; NLRB v. Sanson Hosiery Mills, Inc., 5th Cir. 1952, 195 F.2d 350, cert. denied, 344 U.S. 863.

> The underlying purpose of [the Act] is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of elections, with a view of furthering industrial stability and with due regard to administrative prudence.
>
> We find wanting the arguments against these controlling considerations.

75 S.Ct. at 181.

Moreover, we do not think the facts of the instant case approach the unusual circumstances found in WTOP, Incorporated, 114 NLRB 1236, 37 LRRM 1143 (1955) and Public Service Electric & Gas Company, 59 NLRB 325, 15 LRRM 152 (1944), which might warrant a refusal to bargain.

The Company argues that its bargaining with Ochoa, Goderich, and other employees was permissible because they were not employees after their lawful discharge. Some of these employees, however, were not in the group of six employees justifiably discharged on September 5, and our holding that the September 8 discharges were violative of Sections 8(2) (3) and (1) renders this contention meritless as to these employees.[7] Bargaining with individual em-

[7] Alternatively, the Company contends that even if it is considered to have bargained with employees during the time in which it was obligated to bargain with the Union, its actions were not violative of the Act.

Section 9 (a) provides in pertinent part:

ployees, or with outsiders acting on behalf of all employees in the instant situation, constitutes, even in the absence of employer bad faith, a refusal to bargain in good faith with the Union and a violation of employees' Section 7 rights. Medo Photo Supply Corporation v. NLRB, 321 U.S. 678, 64 S.Ct. 830 (1944); NLRB v. Jones & Laughlin Corp., 301 U.S. 1, 57 S.Ct. 615 (1937); Bilton Insulation, Inc v. NLRB, 4th Cir. 1961, 297 F.2d 141. The Board's determination in this regard is amply supported by the record.

Because we find no merit to any of the Company's objections, the order of the Board will be ENFORCED.

[A]ny individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of . . . [an] agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C.A. § 159 (a)

Assuming, without deciding, that the all-encompassing issues involved in the instant case, the substance of which were the essence of the collective bargaining itself, can be negotiated under Section 9 (a), we still find the contention meritless. Contra West Texas Utilities Co. v. NLRB, D.C. Cir. 1953, 206 F.2d 142, cert. denied, 346 U.S. 855; Hughes Tool Co. v. NLRB, 5th Cir. 1945, 147 F.2d 69. There was admittedly no evidence that the Union did not have the opportunity to be present. There was, however, also no proof offered by the Company that the Union did have such an opportunity. Because the burden is on the Company in such circumstances, the contention must fail. See White Sulphur Springs Co. v. NLRB, D.C. Cir. 1963, 316 F.2d 110.

APPENDIX B

186 NLRB No. 73

D-4223
Miami, Fla.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PEPSI-COLA BOTTLING CO. OF MIAMI, INC.

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO

Cases 12-CA-4639
12-CA-4716

DECISION AND ORDER

On May 6, 1970, Trial Examiner Milton Janus issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committted. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Pepsi-Cola Bottling Co. of Miami, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[1]

Dated, Washington, D. C. Nov. 9, 1970.

Edward B. Miller, Chairman

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[1]Chairman Miller would not adopt the finding of the Trial Examiner that Respondent violated Section 8(a)(3) and (1) by discharging employees who halted work, formed a protest group and who, despite the employer's repeated entreaties, refused either to return to their work stations or to leave the plant. Although the Chairman would distinguish the conduct of the sit-down strikers here from that in NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939), he does not join the majority in holding that, under our Act, an employer is precluded from ordering employees to leave the plant if they wish to protest rather than to work and from disciplining employees who, after warning, refuse to comply. See Cone Mills v. NLRB, 413 F.2d 453 (C.A. 4).

TXD-256-70
Miami, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

PEPSI-COLA BOTTLING CO. OF MIAMI, INC.
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO

Cases Nos. 12-CA-4639
12-CA-4716

Howard I. Grossman, Esq.,
for the General Counsel.
Glenn L. Greene, Jr., Esq.
(Greene, Hogg & Allen),
Miami, Fla., for Respondent
Carl A. Suarez and Nicholas
Fayad for the Charging Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

MILTON JANUS, Trial Examiner: United Steelworkers of America, AFL-CIO (hereafter called the Union) filed a charge on September 18, 1969, and an amended charge on November 26, 1969. A complaint based thereon was issued against Pepsi-Cola Bottling Co. of Miami, Inc. (hereafter the Respondent or the Company) in Case No. 12-CA-4639, on December 23, 1969. In the meantime, the Union had filed another charge on December 19, 1969, in Case No. 12-CA-4716, and on January 20, 1970, the Gen-

eral Counsel issued an order consolidating the two cases, together with a consolidated amended complaint and notice of hearing.

I conduct a hearing in this matter at Miami, Florida, on February 25, 1970. At the hearing, the General Counsel, the Company and the Union offered a Stipulation of Facts and agreed that the stipulation with certain attached appendices, the charges, and the consolidated amended complaint would constitute the entire record herein. They also agreed that I should issue a Trial Examiner's Decision based upon the record and upon such arguments and briefs as the parties might submit. No testimony was therefore taken at the hearing, but the General Counsel and the Company argued orally at the close of the proceeding. Thereafter, the Company also filed a written brief. Upon the record thus constituted,[1] including the arguments and brief, I make the following:

Findings of Fact

I. The Business of the Employer

The Respondent is a Florida corporation with its place of business in Miami, Florida, where it is engaged in the manufacture and sale at wholesale of soft drinks at its Miami plant. During a recent representative 12-month period, Respondent purchased goods, materials and supplies valued in excess of $50,000 which were shipped to its Miami plant directly from points outside the State of Florida. I find that Respondent is an employer engaged in commerce within the meaning of the Act.

[1] The General Counsel's unopposed motion of March 13, 1970, seeking certain specified corrections in the official transcript is hereby granted.

II. The Labor Organization Involved

United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of the Act.

III. The Unfair Labor Practices

General Background and the Complaint[2]

On July 17, 1969, the Board conducted a representation election in a production and maintenance unit at Respondent's plant, in Case No. 12-RC-3305. The Union won the election and was certified on July 25.

The parties met, exchanged proposals and negotiated a few times. The employees engaged in a work stoppage for a few hours in the plant, and were discharged. Later, during the continuing strike, the Respondent directly offered the strikers full reinstatement and partial restitution of their lost earnings. The strikers all accepted the offer and returned to work. Respondent also granted them improvements in their wages and working conditions unilaterally.

The complaint alleges that Respondent violated Section 8(a)(3) by terminating 97 employees because they had joined or assisted the Union, or violated Section 8(a)(1) by terminating them for engaging in a concerted work stoppage for the purpose of collective bargaining or mutual aid and protection. It also alleges that Respondent violated Section 8(a)(5) by refusing to bargain with the Union, as the certified representative of the employees; by bargaining directly with its employees and unilaterally

[2]All the events described below occurred in 1969.

granting them benefits; and by failing to offer the Union the same terms and conditions of employment which it offered its employees.

The Facts

Paragraph 7 of the Stipulation of Facts relates what the parties considered pertinent to this case, and since I am bound, in my disposition of the matter, to what the parties have agreed to be the facts, I shall set the Paragraph out in full, together with its Appendices C and D:

(a) On August 29, 1969, Respondent met with Union representatives Nicholas Fayad and Carlos Suarez, and conducted collective-bargaining negotiations concerning rates of pay, wages, hours of employment, and other terms and conditions of employment of the employees in the unit described above in paragraph 5. The Union presented a proposed agreement, a true copy of which is attached hereto marked Appendix A. A few days later Respondent presented its proposed contract to the Union, a true copy of which is attached hereto, marked Appendix B.

(b) On September 5, 1969, six employees in the unit described above in paragraph 5, who disapproved of Respondent's bargaining, engaged in a slow-down, and were discharged by Respondent.

(c) On September 8, 1969, other employees in the same unit demanded reinstatement of the six employees referred to in paragraph 7(b) above, and, when Respondent refused, the employees refused to work, or leave the plant, and sat down. They made no attempt to seize the plant, or machinery. Respondent contacted the police, who

arrived a short time later, and asked the employees to leave the premises. The employees complied with this request, and 97 of them — whose names are listed on the appendix to the consolidated amended complaint — let the premises. The employees did not engage in violence, or threats of violence, and did not damage equipment. Upon leaving the premises, they started picketing Respondent with signs protesting the latter's alleged unfair labor practices.

(d) Prior to the departure of the 97 employees, Respondent informed them that they were discharged for having engaged in an illegal sit-down strike. Respondent later sent a letter to each employee making the same statement.

(e) On the same day, September 8, 1969, Respondent met with Union representatives Fayad and Suarez, and engaged in further collective-bargaining negotiations. The Union representatives demanded, and Respondent refused, reinstatement of the 6 employees discharged on September 5, 1969.

(f) Respondent met again with Union representatives Fayad and Suarez on September 15, 1969. In response to a Union request for a wage increase, Respondent offered a 3½ percent increase for all employees in the unit described in paragraph 5 above. The salary range of said employees at that time was from $1.80 to $2.10 per hour. The Union rejected this proposal.

(g) On September 18, 1969, Respondent's counsel Glenn Greene, Jr., called Union representative Suarez and informed him that Respondent was standing pat on its

3½ percent wage increase offer. Greene also informed Suarez that Respondent would not reinstate any of the employees, neither those discharged on September 5, nor the strikers. Greene sent a letter to Fayad the same day, September 18, 1969, confirming Respondent's position, and cancelling a negotiating session which had been scheduled for September 22, 1969. A true copy of that letter is attached hereto as Appendix C.

(h) On September 17, 1969, Respondent's general manager Herbert Page, a supervisor and an agent of Respondent within the meaning of the Act, met with Julio Ochoa, a member of the Union negotiating committee and one of the employees whom Respondent had discharged on September 5. Page told Ochoa that Respondent would give the employees a wage increase of 25 cents per hour, and would reinstate all of the employees, including the strikers and the six employees discharged on September 5. Page also told Ochoa that Respondent would give each employee one week's pay which Respondent would consider to be a loan at first, and an outright gift later if production increased.

(i) On September 18, 1969, Page met again with Ochoa and with another employee member of the negotiating committee, Pedro Goderich. Page repeated his offers made to Ochoa the previous day, and added that Respondent would improve the employees' insurance program and attempt to improve the allowance for uniforms. He also said that the Company would keep the production bonuses in effect at the plant. Respondent did not make any of the offers referred to in this, or in the preceding paragraph, to Union representatives Fayad or Suarez.

(j) On September 22, 1969, Respondent reinstated all of the strikers and the six employees discharged on September 5, 1969. The employees accepted reinstatement, and stopped picketing.

(k) On September 23, 1969, Page made a speech at the plant to all employees in which he told them that they would receive a wage increase of 25 cents per hour, a better insurance plan, and one week's pay for the time they were on strike. He also told them that the Union was dead at the plant, and that his door was always open. Page stated that he would deal with an employee committee concerning any employee complaints.

(l) General Manager Page met with certain employees on September 24, and again on October 2, 1969, and agreed to provide better ventilation and improved toilet facilities at the plant, and a 15 minute break period. Respondent gave each employee an hourly wage increase of 25 cents, about a week later.

(m) By letter dated September 22, 1969, from the Union to the Respondent, the former protested the Company's dealing with the employees, and the breakoff of negotiations. There have been no bargaining sessions between Respondent and the Union since September 15, 1969. A true copy of this letter is attached hereto as Appendix D.

The two letters marked Appendices C and D to the stipulation are set out below:

Appendix C

September 18, 1969

Mr. Nicholas Fayad
Staff Representative
United Steelworkers of America
P. O. Box 393
599 West 28th Street
Hialeah, Florida 33011

Re: Pepsi Cola Bottling Co. of Miami, Inc. Contract Negotiations

Dear Mr. Fayad:

Due to an emergency situation that has arisen with one of my out of state clients, I find it necessary to be out of Miami all of next week and must therefore cancel our negotiating session scheduled for Monday, September 22, 1969.

Secondly, during my telephone conversation this morning with Mr. Suarez of your office, and at which time I conveyed our wage offer of three and one-half (3½%) percent effective January 1, 1970, I was advised by Mr. Suarez that he was insisting that Pepsi Cola take back the eighty (80) employees that were discharged for engaging in an unlawful and illegal slow down and/or sit down strike. It is our position this is an illegal demand and cannot be made a condition to reaching a collective bargaining agreement. If and when you desire to negotiate about legitimate contract issues, we will be most happy to meet with you at a mutually convenient time; otherwise, we see no point in continuing our discussions.

Sincerely,

GLENN L. GREENE, Jr.

Appendix D

September 22, 1969

REGISTERED LETTER — RETURN RECEIPT REQUESTED
Mr. Herbert Paige, General Manager
Pepsi Cola Bottlers of Miami, Inc.
7777 N. W. 41st Street
Miami, Fla. 33152

Dear Mr. Paige:

We wish to protest the unfair labor practice which Pepsi Cola continues to commit.

Your latest violation consisted of your calling a meeting with the local union committee without notifying either myself or Mr. Suarez. In addition, your attorney cancelled a meeting we had set up for this morning, September 22, 1969 and notified us he was breaking-off negotiations,

Your Company must use negotiators who are free at reasonable times to meet with the Union.

We also insist that negotiations have not reached an impasse. We are certain that if you intend to bargain in good faith we can reach a settlement.

However your conduct has every appearance that you intend to avoid reaching an agreement and until your conduct changes, we will pursue our remedies with the National Labor Relations Board.

Yours truly,

Nicholas Fayad
Staff Representative

cc: Mr. George Longshore
Mr. Glenn L. Greene

The-Strike and the Discharges

The complaint does not allege that the discharge on September 5 of the six employees who had engaged in a slow-down was illegal. Thus, the work stoppage of the 97 employees on September 8, protesting the nondiscriminatory discharges a few days earlier, was not in its inception an unfair labor practice strike. However, a strike to protest even a nondiscriminatory discharge is itself protected concerted activity,[3] so that the 97 employees who sat in at the plant on September 8 would be protected against discharge unless the sit-in was itself illegal. Respondent contends that it was privileged to discharge these 97 employees because their work stoppage was an illegal sit-down strike.

I assume, based on Paragraph 7(c) of the Stipulation of Facts that the employees who engaged in the in-plant stoppage on September 8 were asked to leave by Company officials, but refused to do so until the request was repeated by the police. Although no violence or damage to the plant or equipment occurred, Respondent regards the work stoppage in the plant as an illegal seizure and sit-down which justifies its discharge of all 97 employees. The precedents relied on by Respondent date back to the late 1930's, the early years of the Act.[4] They involve the seizure and possession of plants long beyond the work shift in which the sit-down first occurred, and the ousting or exclusion of management representatives. They were all illegal tres-

[3]Cone Mills Corporation, 169 NLRB No. 59 and Kallaher and Mee, Inc., 87 NLRB 410.

[4]N.L.R.B. v. Fansteel Metallurgical Corp., 306 U.S. 240; McNealy & Price Company v. N.L.R.B., 106 F.2d 878 (C.A. 3); and Stewart Die Casting Corporation v. N.L.R.B., 114 F.2d 819 (C.A. 2).

passes, and though some did not include acts of violence or damage to the plant by the employees sitting in, they all included a potential for violence through the forcible dispossession of management officials.

Ours is a far different case. The sit-in here lasted only a few hours and did not extend beyond the employees' normal working hours, and no employee sought to bar or exclude Company officials. Nor does the fact that it was undertaken as a protest against the nondiscriminatory discharges of other employees, rather than against unfair labor practices committed by the Employer, transform the in-plant cessation of work into an illegal sit-down strike. In my opinion, the facts here are much more like those in the cases relied on by the General Counsel[5] than they are to those cited by Respondent. I therefore find that the 97 employees were discharged by the Company for engaging in concerted protected activities on the morning of September 8, in violation of Section 8(a)(3) and (1).

On September 17, according to Paragraph 7(h) of the Stipulation, Respondent's general manager, Page, offered to take back the 97 employees it had wrongfully discharged on September 8 as well as the six it had justifiably discharged 3 days before. This offer of reinstatement and the simultaneous offer to give the employees a loan of one week's pay for the wages lost while on strike, was made to Ochoa, an employee and member of the Union's negotiating committee rather than to the full committee including Fayad and Suarez, the Union's full-time representatives

[5]KDI Precision Products, Inc., 176 NLRB No. 18, Hanes Hosiery Division, 168 NLRB No. 111, and Lee Cylinder Division of Golay & Co., Inc., 156 NLRB 1252, enf'd as mod. 371 F.2d 259 (C.A. 7). See also, Kennametal, Inc., 80 NLRB 1481, enf'd 182 F.2d 817 (C.A. 2).

and negotiators. The inference I draw from Page's approach to Ochoa and his attempt to end the strike is that Respondent intended to conceal its action from Fayad and Suarez and to by-pass them by dealing directly with the employees. Thus, the very next day, Respondent's attorney Greene wrote Fayad telling him, among other things, that the Company had rejected the Union's demand that it take back all the strikers. Yet the same day, September 18, Page again approached Ochoa and another employee member of the negotiating committee, Goderich, and repeated his offer to take all the strikers back, and added even more inducements to have them return.

The Stipulation is perhaps deliberately vague on the nature of the Union's demands for terminating the strike. The only references to a request for reinstatement on behalf of any of the employees are in Paragraphs 7(e) and 7(g). The request mentioned in 7(e) as being made on September 8, the first day of the strike, is clearly inadequate as an unconditional request for reinstatement of the strikers since it was limited to the six employees whom Respondent had discharged on September 5, and whom it had no obligation to reinstate. Paragraph 7(g) relates a conversation between Greene and Suarez on September 18 in which Greene said that the Company would not reinstate any of the employees, neither the strikers nor those discharged on September 5. I do not construe this as a stipulation that Suarez, or anyone else acting for the Union, had made an unconditional application for the reinstatement of the 97 strikers who had been discharged on September 8 for engaging in concerted protected activities.[6]

[6]Beaver Bros. Baking Co., Inc., 171 NLRB No. 98, fn. 13 and accompanying text.

But even if I am wrong in finding that the Union did not make an unconditional request for the reinstatement of the 97 unfair labor practice strikers, I would still not recommend an affirmative order that Respondent reinstate them (since it has already done so) nor an order that they be made whole for any backpay they may have lost. If it was made at all, the Union's request for reinstatement of the strikers must have been made by Suarez to Greene in their conversation of September 18, a Thursday. All the employees were in fact reinstated on the following Monday, September 22, after one, or at most, two working days. Thus, the interval between the request for reinstatement and the date on which a backpay obligation would begin, if the Company had not reinstated the strikers, was shorter than the 5 days which the Board customarily grants in these situations.[7]

Refusal to Bargain

The facts underlying the refusal to bargain allegations of the complaint, as set out in the Stipulation, are fairly explicit. The Union was certified on July 25, it met with Respondent on August 29, and within a few days thereafter, each party had submitted a proposed agreement to the other. (Respondent's 29 page proposal contained no offer on wages, pensions, vacations, holidays or insurance.) They met again on September 8, the day on which 97 employees went on strike and, as I have found, were illegally discharged therefor. On that occasion, the parties engaged in further bargaining, and the Union representatives demanded reinstatement of the six employees who had been previously discharged. On September 15, the parties pre-

[7]Florida Machine & Foundry Company, 174 NLRB No. 170.

sented their positions on a wage increase. On September 18, Respondent's attorney Greene called Suarez and told him that the Respondent was standing pat on its 3½ percent wage offer which amounted to about 7 cents per hour at the current rates. The same day Greene sent a letter to Fayad cancelling a negotiation session set for September 22 because he had to be away from Miami all that week. Despite the offer of General Manager Page made to Ochoa the day before to take everyone back and to give them a 25 cent per hour wage increase, Greene also said in his letter that the Union's insistence that everyone be reinstated was illegal and could not be made a condition to reaching a bargaining agreement. On September 22, Fayad protested by letter to Greene about the Respondent meeting with the Union committee without notifying either himself or Suarez, about cancellation of the session which had originally been set for that day without providing another negotiator to replace Greene, insisted that negotiations had not reached an impasse and that the Union would pursue its remedies with the Board.

These are the facts I have to go on, and in themselves they reveal a simple classic case of an employer, obligated to bargain with a certified representative, who chooses instead to deal directly with the employees by offering them more than it has offered the representative in the express hope that they will abandon their chosen Union.

To offset the strong prima facie case made by the General Counsel from the facts set out in the Stipulation, Respondent relies in its written brief, as if they were proven facts, on statements which it made in its oral argument at the hearing, and substitutes conjectures and unwarranted inferences for the matters agreed to in the Stipulation.

First, the Respondent argues that it was justified in refusing to bargain further with the Union because the Union insisted as a condition to reaching an agreement that all the employees be reinstated and that such a condition is, in effect, a non-mandatory bargaining issue. The flaw in the argument is that the Stipulation does not bear out Respondent's assumption that the Union refused to continue bargaining on wages, hours and other mandatory issues unless the Company first agreed to reinstate all the strikers and discharged employees.

All that the Stipulation says on this point is that on September 8, the Union demanded reinstatement of the six employees who had been discharged for nondiscriminatory reasons on September 5. Thereafter, at their next meeting, on September 15, the Union requested a wage increase, and the Respondent offered it approximately 7 cent per hour, which the Union rejected. The Stipulation does not say that the Union then demanded everyone's reinstatement before it would make any counterproposal to the Respondent's initial wage offer. I do not doubt that the Union was vitally concerned about the status of the employees, and pressed for their reinstatement but this would be as part of a general strike settlement in which all pending issues would be mutually resolved.

The only basis for Respondent's argument that the demand for reinstatement of all 103 employees was a condition to any further bargaining is Greene's letter to Fayad (Appendix C to the Stipulation). This is clearly a self-serving statement since the letter was sent after General Manager Page offered to take back all the employees in his offer to Ochoa—the very employees whom Greene was claiming had no right to reinstatement. It is obvious then

that by September 18, Greene was attempting to lay a foundation for refusing to bargain with the Union by his claim that the Union was not entitled to demand what the Company was already willing to give. His purpose was to avoid bargaining with the Union by giving the employees the reinstatement and the improvements in wages, etc. which it refused to discuss with the Union.

I find that the Company's contention that the Union was imposing an illegal condition on further bargaining is unmeritorious both on the facts and the law. The Union had in fact imposed no inflexible condition on further bargaining, and its request for the reinstatement of all 103 employees, even if made, was a proper bargaining issue on which Respondent was obligated to negotiate.[8]

Respondent's next contention, that it did not refuse to bargain with the Union after September 22, when all the strikers were reinstated, is also unsupported by the facts. Greene's letter of September 18 informed Fayad, first, that he would not meet with him the week of September 22, but offered him no alternative date; second, Greene told Fayad that he saw no point in continuing further discussions unless the Union retracted its so-called illegal demand. Fayad's letter in response pointed out that negotiations had not reached an impasse, that the Company had to provide negotiators who were free to meet with him at reasonable times, and that the Union would pursue its remedies with the Board until the Company changed its

[8]Midwestern Instruments, Inc., 133 NLRB 1132, 1140-1. In this case the Union specifically conditioned any bargaining on the reinstatement of employees guilty of strike misconduct, which the Trial Examiner held, excused the Employer from further bargaining. He also held, however, that the reinstatement of strikers, including those guilty of misconduct, was a bargainable issue.

intentions about reaching an agreement. If Respondent was truly serious about negotiating with the Union, it could have offered to do so to forestall the filing of charges with the Board; and, of course, it had an obligation to bargain with the Union even while charges were pending. Respondent's preference for ignoring the certified representative while treating directly with the employees cannot be excused by a claim that the Union had to make still another request for bargaining after September 22.

Respondent next argues that the 103 strikers whom it reinstated were not in fact employees but only applicants for employment, so that its direct dealing with them was not in derogation of the Union's certification. The argument is easily refuted. The 97 employees who struck on September 8 remained employees under the Act, despite their purported discharge, and the other six who were legally discharged on September 5, were rehired on the 22nd. The Union represented everyone who was in the unit, before, during and after the strike, and the Company was obligated to bargain with it continuously before, during and after the strike. The Union could also present grievances on behalf of discharged employees and strikers while it was seeking to negotiate for a bargaining agreement.

Alternatively, Respondent argues that even if the 103 strikers retained their status as employees, the actions of its general manager in offering them a 25-cent per hour raise across the board amounted to nothing more than an adjustment of grievances, provided for in Section 9(a) of the Act. The short answer to that contention is that the right to seek an adjustment of grievances, that is, minor disputes not covered by a bargaining agreement, is not a

limitation on the right of a certified Union to act as the exclusive bargaining representative on such major matters as wages and conditions of employment.

Respondent's final argument is that the rule of Ray Brooks v. N.L.R.B., 348 U. S. 96, that an employer must bargain with the certified representative of his employees for at least one year, is not applicable here because of unusual circumstances. The "unusual circumstances" are said to be that the Union no longer enjoys the confidence of the unit employees because it did not protect their interests by requesting their reinstatement after their unprotected sit-down, but instead continued to insist in its negotiations that the six employees discharged on September 5 be reinstated as a condition for the return of the others. Respondent thus seeks to give the appearance of being as concerned for the welfare of its employees, whom it first discharged for engaging in protected concerted activities, as is the Union which these employees had selected as their representative in a secret ballot election. It faults the Union for not knowing how to represent its unit members and suggests that it can do better for its employees than can their Union. In a sense it has done better for them — by giving them a wage increase more than three times as large as the one it offered to the Union, and by acceding to their demands for improved working conditions. Its only price for this unexpected beneficence was the employees' renunciation of the Union. Such renunciation, if it did occur (although there is nothing in the Stipulation to suggest that it did) was brought about by the Employer's own calculated unfair labor practices. This hardly constitutes "unusual circumstances" within the Brooks rule, such as to justify the Employer from bargaining with the certified representative at least during the

certification year, and beyond, if that is necessary to dissipate the continuing effects of its unfair labor practices.

I find, in accordance with the complaint, and based on the stipulated facts, that Respondent viloated Section 8(a)(5) and (1), by refusing to meet and negotiate with the Union, by bargaining directly with the employees, by granting them higher wages and working conditions than it had offered their exclusive bargaining representative, by telling the employees that the Union was dead at the plant, and by offering to deal with an employee committee concerning their complaints.

IV. The Effects of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with its operations described in Section I above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices violative of Sections 8(a)(1), (3) and (5) of the Act, I shall recommend that it cease and desist therefrom, and take certain appropriate affirmative action. I have already noted that I believe no affirmative action with respect to the 97 employees discharged on September 8, is now necessary, since they were all reinstated on September 22, and no backpay is due them.

I will recommend, however, that Respondent, upon request, recognize and bargain with the Union as the exclusive representative of all its employees in the appropriate unit with respect to rates of pay, wages, hours and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. In order to ensure that the employees will be accorded the services of their selected bargaining agent for the period provided by law, I recommend that the initial year of certification be considered to begin on the date the Respondent commences to bargain in good faith with the Union.[9]

Because of the character and scope of the unfair labor practices which Respondent has engaged in, I will recommend that it cease and desist from interfering with, restraining and coercing its employees in any other manner in the exercise of their rights guaranteed in Section 7 of the Act.

Conclusions of Law

1. All production and maintenance employees including vending department employees, warehouse employees and checkers employed by the Respondent at its Miami, Florida, plant, excluding all driver salesmen, advertising employees, merchandise employees, office clerical employees, professional employees, guards, watchmen and supervisors as defined in the Act, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

2. At all times on and after July 25, 1969, United Steelworkers of America, AFL-CIO, has been, and still is,

[9] Amax Aluminum Extrusion Products, Inc., 174 NLRB No. 163, and cases cited therein.

the exclusive representative of all employees within said appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment, within the meaning of Section 9(a) of the Act.

3. By refusing at all times on and after September 22, 1969, to recognize and to meet and negotiate with the above-named Union, as the exclusive representative of the employees in the appropriate unit, and by unilaterally, without prior notice to or consultation with the Union, granting wage increases and other benefits to the unit employees in September and October 1969, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

4. By discharging its employees on September 8, 1969, for engaging in concerted protected activities on behalf of the Union, Respondent has discriminated against them, thereby discouraging membership in the Union, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. By the foregoing conduct Respondent has interfered with, restrained and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, and has thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

RECOMMENDED ORDER

Respondent, Pepsi Cola Bottling Co. of Miami, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to recognize, meet and bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive representative of its employees in the following appropriate unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees of Respondent at its Miami, Florida, plant, including vending department employees, warehouse employees and checkers, excluding all driver salesmen, advertising, merchandise, office clerical, and professional employees, guards, watchmen and supervisors as defined in the Act.

(b) Promising and granting employees wage increases, and other improvements in their terms and conditions of employment, in order to induce them not to support the above-named, or any other union, as their bargaining representative.

(c) Making unilateral changes in wages, rates of pay, or other terms or conditions of employment of their employees without first notifying and consulting with the above-named Union or any other exclusive bargaining representative in the appropriate unit.

(d) Discouraging membership in the above-named or any other union by discriminatorily discharging its employees or by discriminating in any other manner with respect to their hire or tenure of employment or any term or condition of employment.

(e) In any other manner interfering with, restraining or coercing their employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by the proviso in Section 8(a)(3) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Upon request, bargain collectively with the Union as the exclusive representative of the employees in the above-described unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and embody any understanding reached in a signed agreement.

(b) Post at its place of business in Miami, Florida, copies of the attached notice marked Appendix A.[10] Copies

[10]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In

of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to Respondent's employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.[11]

Dated at Washington, D. C.

/s/ Milton Janus

Milton Janus
Trial Examiner

---

the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[11]In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency Of The United States Government

Following a trial in which the Company, the Union, and the General Counsel of the National Labor Relations Board participated, it has been found that we violated the Act. We have been ordered to post this notice and we intend to carry out the order of the Board, and abide by the following:

WE WILL bargain collectively in good faith, upon request, with UNITED STEELWORKERS OF AMERICA, AFL-CIO, as the exclusive representative of all employees in the unit for which that Union was certified by the National Labor Relations Board on July 25, 1969, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, we will sign a contract containing such understanding.

WE WILL NOT promise or grant to our employees wage increases and other improvements in their working conditions in order to induce them not to support UNITED STEELWORKERS OF AMERICA, AFL-CIO.

WE WILL NOT make unilateral changes in wages, rates of pay, or other working conditions of our employees without first notifying and consulting with the above-named Union.

WE WILL NOT discourage membership in UNITED STEELWORKERS OF AMERICA, AFL-CIO, or any other Union by discriminatorily discharging our employees, nor will we discriminate against them in any other manner, with respect to their hire or tenure of employment or any term or condition of employment.

All our employees are free to become or remain union members.

PEPSI COLA BOTTLING CO.
OF MIAMI, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This Is An Official Notice And Must Not Be Defaced By Anyone.

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, Room 706 Federal Office Building, 500 Zack Street, Tampa, Florida 33602 (Tel. No. 813 - 228-7227).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1528

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PEPSI-COLA BOTTLING CO. OF MIAMI, INC.,
Respondent.

[Filed Nov. 4, 1971]

JUDGMENT

Before: THORNBERRY, MORGAN and CLARK, Circuit Judges.

THIS CAUSE was submitted to this Court upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Pepsi-Cola Bottling Co. of Miami, Inc., its officers, agents, successors, and assigns on November 9, 1970. The Court, having carefully considered the transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on October 13, 1971, handed down its opinion granting enforcement of the Board's said order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Pepsi-Cola Bottling Co. of Miami, Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: Nov. 4, 1971

[TITLE OMITTED]

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed judgment in the above captioned matter has this day been served by first class mail upon the following counsel at the address listed below:

Greene, Hogg & Allen
Att: Glenn L. Greene, Jr., Esq.
1201 Brickell Ave., Suite 602
Miami, Florida 33131

/s/ Marcel Mallet-Prevost

Marcel Mallet-Prevost
Assistant General Counsel
NATIONAL LABOR
RELATIONS BOARD

Dated at Washington, D.C.
this day of OCT. 20, 1971

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1528

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

PEPSI-COLA BOTTLING COMPANY OF MIAMI, INC.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Florida Case)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Oct. 13, 1971, 5 Cir., 1971, __F.2d__).

(December 28, 1971)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130
Tel. No. 527-6514

March 14, 1972

MEMORANDUM TO COUNSEL OR PARTIES
LISTED BELOW:

No. S71-1528 — National Labor Relations Board v.
Pepsi-Cola Bottling Co. of Miami, Inc.

Gentlemen:

The following action has this day been taken in the above case:

( ) Motion to consolidate granted.

( ) Motion to supplement or correct record granted.

( ) Motion for leave to file supplemental brief granted.

(X) A further stay of mandate has been granted to and including March 27, 1972.

( ) The Court's opinion-order on petition for rehearing and petition for rehearing en banc has this day been rendered and a copy thereof is enclosed.

( ) Joint Motion as to time for filing briefs granted.

( ) Order enclosed has been entered.

( )

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Susan B. LeBrun
Deputy Clerk

cc: Mr. Marcel Mallet-Prevost
Mr. Harold A. Boire
Mr. Glenn L. Greene, Jr.

APPENDIX F

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer

shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

* * *

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or re-

straining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

* * *

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SUPREME COURT, U. S.

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No. 71-1230

In the Supreme Court of the United States

OCTOBER TERM, 1971

PEPSI-COLA BOTTLING COMPANY OF MIAMI, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,

NORTON J. COME,
Assistant General Counsel,

JACK H. WEINER,
Attorney,

National Labor Relations Board,
Washington, D.C. 20570.

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Statute:

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1230

PEPSI-COLA BOTTLING COMPANY OF MIAMI, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 449 F. 2d 824. The Board's decision and order (Pet. App. 17-44) are reported at 186 NLRB No. 73.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1971 (Pet. App. 45-66). A timely petition for rehearing was denied on December 28, 1971 (Pet. App. 47-48). The petition for a writ of certiorari was filed on March 27, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, on the facts of this case, the Board properly concluded that a work stoppage by 97 employees in protest over the discharge of six fellow workers, which included a brief peaceful plant "sit-in" by the striking employees, was concerted activity protected by Section 7 of the National Labor Relations Act.

2. Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to meet and negotiate with the union, unilaterally changing working conditions, dealing directly with the employees, and other similar conduct.

STATUTE INVOLVED

In addition to the provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), set forth at Pet. App. 51-53, also relevant is Section 7, which provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

STATEMENT

A. The Stipulated Facts

On July 17, 1969,[1] the Board conducted a representation election at the Company's soft drink plant which resulted in the certification of the United Steelworkers of America ("the Union") as the employees' bargaining representative (Pet. App. 2, 21). Union representatives met without success with Company officials on August 29 to discuss contract terms (Pet. App. 2, 21). On September 5, six employees who disapproved of the Company's bargaining tactics engaged in a work slowdown and were discharged (Pet. App. 2).

1. *The work stoppage by 97 employees*

On the morning of September 8, the remaining employees reported to work as usual. After working for a brief period, 97 employees ceased work and went to the plant manager to protest the discharges (Pet. App. 2, 22). When the plant manager rejected a demand for reinstatement of the dischargees, the 97 employees sat down in the plant and refused the

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[1] All events described hereinafter occurred in 1969.

Company's demand that they return to work or leave the plant (Pet. App. 2, 22). The employees made no attempt to seize the plant or machinery, and did not engage in violence or damage plant equipment (Pet. App. 2, 22). About 30 minutes after they had refused management's request to leave, all 97 employees were told that they were discharged (Pet. App. 2-3, 22-23; see also J.A. 48-49).[2] Shortly before noon, the Company summoned the police, who, upon arrival, requested the employees to leave the premises. The employees promptly did so and began picketing outside (Pet. App. 3, 23).

2. *The Company's refusal to bargain with the Union*

At the August 29 meeting (*supra*, p. 3), the Union presented a proposed contract with detailed rates of pay and other benefits (Pet. App. 3, 22; J.A. 59-85). A few days later, the Company presented a counterproposal which contained nothing concerning wages, pensions, vacations, holidays, or insurance (Pet. App. 3, 22; J.A. 86-115 at 115). Union representatives met with the Company again on September 8 (Pet. App. 3, 22-23). The Union demanded reinstatement of the 6 employees who had been discharged on September 5, and the Company refused (Pet. App. 3, 23). The Union met with the Company for a third time on September 15. The Union requested a wage increase and was offered a

[2] "J.A." refers to the Joint Appendix to the briefs in the court below.

3½ percent increase for all employees, or approximately 7 cents an hour. The Union rejected this proposal (Pet. App. 3, 23).

On September 17, Company General Manager Page met with Julio Ochoa, a member of the Union's negotiating committee and one of the 6 employees discharged on September 5 (Pet. App. 3, 24). Page told Ochoa that the Company would give a wage increase of 25 cents per hour and would reinstate all 103 discharged employees (Pet. App. 3, 24). Page also told Ochoa that the Company would give each employee one week's pay, which would be considered a loan at first and an outright gift later on if production increased (Pet. App. 3, 24, 29). This offer was made to Ochoa alone rather than to the negotiating committee, which included the Union's full-time representatives and negotiators (Pet. App. 29).

The following day, Company Counsel called Union negotiator Suarez and informed him that the Company was standing pat on its 3½ percent wage proposal (Pet. App. 4, 23-24). Despite the offers made to Ochoa the day before, Greene informed the Union representatives that none of the employees would be reinstated (Pet. App. 32). That same day, Page again approached Ochoa and another employee member of the negotiating committee, and repeated his offer of the previous day. Page offered additional benefits as inducements for the employees to return (Pet. App. 4, 30). None of these offers was made to the Union representatives (Pet. App. 4, 24).

On September 22, all of the 103 discharged em-

ployees were reinstated and the picketing stopped. That same day, the Union wrote Page, objecting to the Company's action in meeting with the employee committee members and in cancelling the scheduled bargaining session (Pet. App. 4-5, 25, 27, 32). The Company never responded to the letter and no further bargaining sessions between it and the Union were held (Pet. App. 5, 24).

On September 23, Page, in a speech to all the employees, stated that the Union was dead at the plant, that he would deal with an employee committee concerning employee complaints, and that additional benefits including a 25-cent per hour pay increase would be forthcoming (Pet. App. 5). The promised additional benefits were subsequently put into effect (Pet. App. 5; J.A. 57-58).

B. The Decisions Below

The Board found that the in-plant cessation of work by the 97 employees to protest the discharge of 6 fellow employees, which "lasted only a few hours and did not extend beyond the employees' normal working hours, and [during which] no employee sought to bar or exclude Company officials," was not an unlawful seizure or sitdown, but rather concerted activity protected by Section 7 of the Act. Accordingly, it held that the Company violated Section 8(a)(3) and (1) of the Act by discharging the employees for engaging in such activity (Pet. App. 29).[3] The

[3] Chairman Miller dissented from this finding (Pet. App. 18, n. 1).

Board further found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to meet and negotiate with the Union as the exclusive representative of the employees, bargaining directly with the employees, unilaterally granting them higher wages and better working conditions than it had offered the Union, and other similar conduct (Pet. App. 37). The Board ordered the Company, *inter alia*, to cease and desist from the unfair labor practices found and to bargain collectively with the Union upon request (Pet. App. 40-49).[4]

The court of appeals found "no merit to any of the Company's objections," sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1-16).

ARGUMENT

1. The court below properly concluded that the peaceful and orderly cessation of work by the 97 employees who sat down at their jobsites for a short while to protest the discharge of their 6 fellow employees[5] was concerted activity protected by Section

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[4] The Board provided no affirmative relief for the 97 employees, since the Company had reinstated them before any backpay obligation had accrued (Pet. App. 31, 37).

[5] As the court below noted (Pet. App. 13): "It is well settled that a concerted work stoppage to protest even a lawful discharge of a fellow employee is protected by Section 7 of the Act." *National Labor Relations Board* v. *Phaostron Instrument and Electronic Co.*, 344 F. 2d 855, 858 (C.A. 9); *National Labor Relations Board* v. *Puerto Rico Rayon Mills, Inc.*, 293 F. 2d 941, 946 (C.A. 1); *National Labor Relations Board* v. *Solo Cup Co.*, 237 F. 2d 521 (C.A. 8); *National Labor Re-*

7 of the Act, and "not contrary to [this] Court's decision in *Fansteel*" [6] (Pet. App. 13). As the court pointed out (Pet. App. 11):

> We find no facts in the instant case tending to show that the employees were claiming to hold the premises in defiance of the owner's right of possession. The employees had worked for part of the work shift already and the sit-down did not, nor did it threaten to carry over into the next shift. Furthermore, the employees left immediately when requested to do so by the police. • • •

Such conduct is a far cry from the seizure of the plant for some ten days and the violent resistance to attempts by police authorities to compel obedience to an injunction order requiring surrender of the premises, which were present in *Fansteel*, 306 U.S. at 248-249, 252. Indeed, in *National Labor Relations Board* v. *American Manufacturing Company*, 106 F. 2d 61 (C.A. 2), which involved a work stoppage similar to that here,[7] the court of appeals rejected

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lations Board v. *J. I. Case Co.*, 198 F. 2d 919, 921-923 (C.A. 8), certiorari denied, 345 U.S. 917.

[6] *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.

[7] There, employees engaged in a temporary work stoppage to compel the employer to bargain in good faith with their union representative. When company officials refused to talk to the employees and told them either to go back to work or leave the premises, some obeyed but others "stood around in groups talking." At noon, they went to lunch and, when they came back with the intention of returning to work, 14 employees were discharged. 106 F. 2d at 67.

the contention that this activity was an illegal sit-down strike, stating (106 F. 2d at 68):

> They certainly were not claiming to hold the premises in defiance of the right of possession of the owner and we regard the case as no different from that of an ordinary strike where work has ceased because of an unfair labor practice.

This Court, with a modification not material here, summarily affirmed the judgment of the Court of Appeals for the Second Circuit, notwithstanding the company's contention that the decision was in conflict with *Fansteel. American Manufacturing Company* v. *National Labor Relations Board*, 309 U.S. 629.[8]

The decision below is likewise consistent with the decisions of other courts of appeals which have held that peaceful in-plant protestors do not forfeit the protection of the Act when, as here, "[t]he alleged 'sitdown' interfered with production no more than a simple cessation of work by these employees would have." *Golay & Co.* v. *National Labor Relations Board*, 371 F. 2d 259, 262 (C.A. 7), enforcing as modified, 156 NLRB 1252, 1260-1263, certiorari denied, 387 U.S. 944. Accord: *National Labor Relations Board* v. *Serv-Air, Inc.*, 401 F. 2d 363, 365 (C.A. 10); *Olin Industries, Inc.* v. *National Labor Relations Board*, 191 F. 2d 613 (C.A. 5), certiorari denied, 343 U.S. 919. See also *National Labor Relations Board* v. *Hanes Hosiery Division*, 413 F. 2d

[8] See Brief for Petitioner in that case, October Term, 1939, No. 664, pp. 18-20.

457, 458, n. 1 (C.A. 4); *National Labor Relations Board* v. *Kennametal, Inc.*, 182 F. 2d 817, 818-819 (C.A. 3).[9]

2. Petitioner's contention that the Board erred in finding that it violated its bargaining obligation to the Union (Pet. 14-15) likewise does not merit review. It has long been settled that it is a violation of the Act for an employer to disregard the bargaining representative and negotiate directly with individual employees, whether a majority or minority, with respect to wages, hours, and working conditions. *Medo Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 683-685. Similarly, it is settled that an employer violates the Act by increasing wages and making other improvements in working conditions without first consulting the union about such changes. *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 745-747.

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[9] The cases relied on by petitioner are distinguishable. *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. 2d 849, 855 (C.A. 7), involved strikers who took possession of the plant for a period of 24 hours; *McNeely & Price* v. *National Labor Relations Board*, 106 F. 2d 878 (C.A. 3), involved a sit-down strike lasting six days and terminating only upon eviction pursuant to court order (6 NLRB 800, 812); and, in *Cone Mills Corporation* v. *National Labor Relations Board*, 413 F. 2d 445, 450-454 (C.A. 4), the court found that the employees had bypassed established grievance procedures through which the complaint could have been processed, and that the atmosphere was one of obstruction and threatened violence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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